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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT McCARTHY,

Plaintiff,

v.

**RAPS HOSPITALITY GROUP d.b.a.
HOLIDAY INN EXPRESS HOTEL &
SUITES; RAPS NEWARK, INC.; RAPS
NEWARK, LLC;
INTERCONTINENTAL HOTELS
GROUP; AND DOES 1 THROUGH 10,
Inclusive,**

Defendants.

Case No: **07-3597**

COMPLAINT

**DISCRIMINATORY PRACTICES IN
PUBLIC ACCOMMODATIONS**

**[42 U.S.C. 12182(a) ET. SEQ; CA CIVIL
CODE 51, 52, 54, 54.1, 54.3]**

DEMAND FOR JURY TRIAL

[F.R.Civ.P. rule 38(b)]

INTRODUCTION

1. Plaintiff ROBERT McCARTHY herein complains, by filing this Civil Complaint in accordance with rule 8 of the Federal Rules of Civil Procedure in the Judicial District of the United States District Court of the Northern District of California, that Defendants have in the past, and presently are, engaging in discriminatory practices against individuals with disabilities. Plaintiff alleges this civil action and others substantial similar thereto are necessary to compel access compliance because empirical research on the effectiveness of Title III of the Americans with

Disabilities Act indicates this Title has failed to achieve full and equal access simply by the executive branch of the Federal Government funding and promoting voluntary compliance efforts. Further, empirical research shows when individuals with disabilities give actual notice of potential access problems to places of public accommodation without a federal civil rights action, the public accommodations do not remove the access barriers. Therefore, Plaintiff makes the following allegations in this federal civil rights action:

INTRADISTRICT ASSIGNMENT

2. Pursuant to Local Rule 3-2, this action should be assigned to the Oakland Division as the property that is the subject of this action is situated in Alameda County.

JURISDICTION AND VENUE

3. The federal jurisdiction of this action is based on the Americans with Disabilities Act, 42 United States Code 12101-12102, 12181-12183 and 12201, et seq. Venue in the Judicial District of the United States District Court of the Northern District of California is in accordance with 28 U.S.C. § 1391(b) because a substantial part of Plaintiffs' claims arose within the Judicial District of the United States District Court of the Northern District of California.

SUPPLEMENTAL JURISDICTION

4. The Judicial District of the United States District Court of the Northern District of California has supplemental jurisdiction over the state claims as alleged in this Complaint pursuant to 28 U.S.C. § 1367(a). The reason supplemental jurisdiction is proper in this action is because all the causes of action or claims derived from federal law and those arising under state law, as herein alleged, arose from common nucleus of operative facts. The common nucleus of operative facts, include, but are not limited to, the incidents where Plaintiff was denied full and equal access to Defendants' facilities, goods, and/or services in violation of both federal and state laws when he attempted to enter, use, and/or exit Defendants' facilities as described below within this Complaint. Further, due to this denial of full and equal access, Plaintiff ROBERT McCARTHY was injured. Based upon the said allegations, the state actions, as stated herein, are so related to the federal actions that they form part of the same case or controversy and one would ordinarily expect the

actions to be tried in one judicial proceeding.

NAMED DEFENDANTS AND NAMED PLAINTIFF

5. Defendants are, and, at all times mentioned herein, were, a business or corporation or franchise organized and existing and/or doing business under the laws of the State of California. Plaintiff is informed and believes and thereon alleges that Defendant RAPS HOSPITALITY GROUP d.b.a. HOLIDAY INN EXPRESS HOTEL & SUITES is located at 5977 Mowry Avenue, Newark, California, 94560-5005. Plaintiff is informed and believes and thereon alleges that Defendants RAPS HOSPITALITY GROUP; RAPS NEWARK, INC.; and/or RAPS NEWARK, LLC; and/or INTERCONTINENTAL HOTELS GROUP are the owners, operators, franchisers, franchisees, licensors, and/or licensees of the HOLIDAY INN EXPRESS HOTEL & SUITES. Additionally, Plaintiff is informed and believes and thereon alleges that Defendants RAPS NEWARK, INC. and RAPS NEWARK, LLC, are the owners, operators, and/or lessors of the real property located at 5977 Mowry Avenue, Newark, California, 94560-5005, Assessor Parcel Number 092A-2549-068. Defendants RAPS HOSPITALITY GROUP; RAPS NEWARK, INC.; and RAPS NEWARK, LLC, are located at 229 Kings Court, San Carlos, California, 94070. Defendants INTERCONTINENTAL HOTELS GROUP is located at 3 Ravina Drive, Suite 100, Atlanta, Georgia, 30346-2149.

6. The words Plaintiffs and Plaintiff as used herein specifically include ROBERT McCARTHY.

7. Defendants Does 1 through 10, were at all times relevant herein subsidiaries, employers, employees, agents, of RAPS HOSPITALITY GROUP d.b.a. HOLIDAY INN EXPRESS HOTEL & SUITES; RAPS NEWARK, INC.; RAPS NEWARK, LLC; and/or INTERCONTINENTAL HOTELS GROUP. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as Does 1 through 10, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiff will pray leave of the court to amend this complaint to allege the true names and capacities of the Does when ascertained.

8. Plaintiff is informed and believes, and thereon alleges, that Defendants and each of them

1 herein were, at all times relevant to the action, the owner, lessor, lessee, franchiser, franchisee,
 2 general partner, limited partner, agent, employee, representing partner, or joint venturer of the
 3 remaining Defendants and were acting within the course and scope of that relationship. Plaintiff is
 4 further informed and believes, and thereon alleges, that each of the Defendants herein gave consent
 5 to, ratified, and/or authorized the acts alleged herein to each of the remaining Defendants.
 6

7 CONCISE SET OF FACTS

8 9. Plaintiff ROBERT MCCARTHY (hereinafter "MCCARTHY") has physical impairments
 9 and due to these impairments he has learned to successfully operate a wheelchair for mobility.
 10 Plaintiff MCCARTHY said physical impairments substantially limit one or more of the following
 11 major life activities including but not limited to: walking.

12 10. In year 2007, Plaintiff MCCARTHY went to Defendants' public accommodation facilities
 13 known as RAPS HOSPITALITY GROUP d.b.a. HOLIDAY INN EXPRESS HOTEL & SUITES
 14 (hereinafter "HOLIDAY INN EXPRESS"), located at 5977 Mowry Avenue, Newark, California,
 15 94560-5005, Assessor Parcel Number 092A-2549-068, to utilize their goods and/or services with
 16 his friend who accompanied MCCARTHY. When Plaintiff MCCARTHY patronized Defendants'
 17 facilities, he was unable to use and/or had difficulty using the public accommodations' disabled
 18 parking, the exterior path of travel, registration counter, guestroom, guestroom bathroom,
 19 guestroom clothing rod and storage, guestroom operable control, lobby men's restroom, and
 20 pool/fitness center facilities including but not limited to the facilities were not accessible because
 21 they failed to comply with ADA Access Guidelines For Buildings and Facilities (hereafter referred
 22 to as "ADAAG" and codified in 28 C.F.R. Part 36, App. A) and/or California's Title 24 Building
 23 Code Requirements. Defendants failed to remove barriers to equal access within their public
 24 accommodation facilities known as the HOLIDAY INN EXPRESS.

25 11. Plaintiff MCCARTHY personally experienced difficulty with said access barriers at the
 26 HOLIDAY INN EXPRESS. The following examples of known barriers to access are not an
 27 exhaustive list of the barriers to access that exist at Defendants' facilities. For example, there fails
 28

1 to be the required disability signage at the entrances to the parking facilities serving the HOLIDAY
2 INN EXPRESS informing patrons they may be fined or their vehicles may be towed if they
3 unlawfully park in a disabled parking space. Also, none of the designated disabled parking spaces
4 have the required disability signage informing patrons they may be fined or their vehicle may be
5 towed if they unlawfully park in a disabled parking space. To the right of the lobby entrance, there
6 is one (1) designated disabled parking space. To the left of the lobby, there are two (2) designated
7 disabled parking spaces, one (1) of which is a designated "Van Accessible" disabled parking
8 spaces, and both of which share an access aisle. The designated "Van Accessible" disabled parking
9 space is located to the left of the other conjoined disabled parking space. The designated "Van
10 Accessible" disabled parking space fails to have a designated safe and accessible exterior path of
11 travel leading to the curb cut, thereby requiring disabled patrons to traverse behind a parked vehicle
12 other than their own parked in the non-"Van Accessible" disabled parking space. To access the
13 curb cut. There fails to be a designated safe and accessible exterior path of travel leading from the
14 public sidewalk to the hotel. Additionally, there fail to be designated safe and accessible exterior
15 paths of travel between the buildings located on the hotel property, thereby requiring disabled
16 patrons to traverse through vehicular traffic to reach the other buildings on the property.

17 12. Within the lobby of the HOLIDAY INN EXPRESS, the registration counter fails to be
18 accessible, as the only usable portion of registration counter is forty-five inches (45") high. There
19 is a lowered section of counter, located on the parking lot side of the registration counter, however,
20 the lowered section of counter is obstructed and filled up with the front desk telephone system
21 console, thereby rendering the lowered section of counter unusable. The HOLIDAY INN
22 EXPRESS clerk required Plaintiff MCCARTHY to conduct all of the registration transaction,
23 including the execution of his registration form, over the very high registration counter. At no time
24 was a clipboard offered to Plaintiff MCCARTHY by hotel staff. The men's restroom located in
25 the lobby fails to be accessible, as the flush valve handle on the commode in the men's restroom is
26 impermissibly located on the far side of the commode. Also, the coat hook within this men's
27 restroom fails to be accessible, as the hook is mounted sixty-eight inches (68") above the finished
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1 floor. The HOLIDAY INN EXPRESS has one hundred (100) guestrooms, including thirty-one
2 (31) suites, on four (4) floors. If a hotel has between seventy-six (76) to one hundred (100)
3 guestrooms, the hotel must have four (4) fully designated accessible guestrooms, plus one (1)
4 additional fully accessible guestroom containing a roll-in shower.

5 13. Plaintiff MCCARTHY paid for and was given Guestroom 105, a guestroom Plaintiff
6 MCCARTHY was assured was a fully accessible guestroom. Guestroom 105 fails to be accessible
7 and Plaintiff MCCARTHY encountered numerous architectural barriers. For example, Plaintiff
8 MCCARTHY was completely precluded from accessing the nighttime security latch on the
9 entrance door of Guestroom 105, as the security latch is mounted sixty-three inches (63") above the
10 finished floor. The guestroom bathroom within Guestroom 105 completely fails to be accessible.
11 Guestroom 105 fails to have a roll-in shower. The existing bathtub/shower enclosure fails to have
12 the required in-tub bench seat. Within the bathtub/shower enclosure there also fails to be adequate
13 grab bar facilities, as there is only one (1) grab bar mounted on the side wall and no grab bar
14 mounted at all on the wall at the foot of the bathtub. The bathtub faucet control valve is mounted
15 very far from the edge of the bathtub, which required Plaintiff MCCARTHY to lean forward and
16 to the side at both an awkward and unsafe angle in order to operate the valve. As a result, Plaintiff
17 MCCARTHY was precluded from using the bathtub portion of the bathtub/shower enclosure for
18 bathing. Additionally, the top of the mounting bracket for the hand held shower spray unit is
19 mounted sixty-seven inches (67") high and is completely unreachable. The circular base for the
20 retractable clothing line in the bathtub/shower enclosure is mounted even higher, at seventy-seven
21 inches (77") high and further beyond the reach of Plaintiff MCCARTHY. As a result, of the above,
22 Plaintiff MCCARTHY was precluded from bathing or showering in the bathtub/shower enclosure
23 within Guestroom 105. In order to clean his body, Plaintiff MCCARTHY had to obtain the
24 assistance of his friend which greatly embarrassed and humiliated Plaintiff MCCARTHY.

25 14. Other architectural barriers exist within the guestroom bathroom on Guestroom 105. For
26 example, the flush valve on the commode fails to be accessible, as the flush valve is mounted on
27 the far side of the commode. The toilet paper dispenser fails to be located in front of the commode.
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1 The operable switch of the heat lamp timer fails to be accessible, as the switch requires tight
2 grasping and/or twisting of the wrist to operate. The coat hook within the guestroom bathroom also
3 fails to be accessible, as it is mounted fifty-five inches (55") above the finished floor.

4 15. Also within Guestroom 105, the clothing rod within the closet fails to be accessible, as the
5 existing clothing rod is mounted sixty-four inches (64") high. When Plaintiff MCCARTHY stayed
6 in Guestroom 105, there was an empty rod mounting that would have allowed for a clothing rod to
7 be installed that would be forty-eight inches (48") high, but there was no second clothing rod to
8 place into the empty mounting nor could Plaintiff MCCARTHY reach the clothing rod that was
9 mounted sixty-four inches (64") high to reposition this rod to the lower mounting bracket. The
10 only storage shelf provided within the closet is mounted higher than the sixty-four inch (64") high
11 rod. The guestroom iron and extra pillows are located on this very high shelf. Therefore, Plaintiff
12 MCCARTHY was precluded from accessing the iron and extra pillows. The window latch is also
13 inaccessible, as the latch is fifty-six and one-half inches (56 1/2") high. The environmental control
14 unit is located directly below the interior ledge of the window. The environmental control unit is
15 sixteen inches (16") deep. The operable controls of the environmental control unit fail to be
16 accessible, as the controls require tight grasping and/or twisting of the wrist to operate.

17 16. The Fitness Center is located in Room 119 of the hotel and the restroom serving this Fitness
18 Center fails to be accessible. The commode in this restroom is too low to be accessible and there
19 fails to be any of the required grab bars around the commode. At the end of the hall from Plaintiff
20 MCCARTHY's guestroom, Guestroom 105, there is a door that leads out to the pool area. Outside
21 the door, which Plaintiff MCCARTHY turned left, he passed through a metal gate with vertical
22 bars and immediately rolled down an access ramp to the pool gate. The latch for this pool gate is
23 inaccessible, as it is mounted on the right side of the gate at the very top of the gate and is located
24 on the poolside of the entrance gate. The latch was extremely difficult to either reach or operate by
25 Plaintiff MCCARTHY. This gate is a metal gate and fails to have the required smooth and
26 uninterrupted surface on the bottom ten inches of the gate entrance door that allows the gate to be
27 opened with a wheelchair footrest without creating a hazard. The pool fails to have the required
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1 assistive lifting device that assists disabled patrons into and out of the pool. There fails to be any
2 disability signage directing patrons to the location of such an assistive lifting device. Also, within
3 the pool area, there is an emergency telephone mounted in a very low location against the building.
4 This telephone is not reachable from the cement patio, as rock landscaping separate the telephone
5 from the patio. When leaving the pool area, there fails to be the required level landing after
6 pushing up the access ramp on the pull side of the pool gate.

7 17. Plaintiff can prove these barriers as Plaintiff conducted a preliminary survey of Defendants'
8 facility. Plaintiff specifically alleges that Defendants knew, to a substantial certainty, that the
9 architectural barriers precluded wheelchair access. First, Plaintiff will prove that Defendants had
10 actual knowledge that the architectural barriers precluded wheelchair access and that the
11 noncompliance with ADAAG as to accessible entrances was intentional. Second, due to the
12 abundance of ADA information and constant news covers of ADA lawsuits, Defendants had actual
13 knowledge of the ADA and decided deliberately not to remove architectural barriers. Third,
14 Defendants have no plans to remodel. Fourth, Defendants had actual knowledge of ADA given all
15 the ADA public awareness campaigns, the abundance of free ADA information and the media's
16 constant ADA coverage. Fifth, a human being acting for the defendants made a conscious decision
17 as to how to proceed given the presence of the architectural barriers. Plaintiff alleges any
18 alternative methods preclude integration of wheelchair patrons, as it requires them to use a second-
19 class entrance. Also, expert testimony will show the facility contained inaccessible features.
20 Plaintiff alleges businesses often state that they have few customers with disabilities. Plaintiff
21 alleges such customers avoid patronizing inaccessible businesses and are deterred from patronizing
22 such businesses.

23 18. Plaintiff MCCARTHY intends to return to Defendants' public accommodation facilities in
24 the immediate future. Plaintiff MCCARTHY is presently deterred from returning due to their
25 knowledge of the barriers to access that exist at Defendants' facilities.

26 19. Pursuant to federal and state law, Defendants are required to remove barriers to their
27 existing facilities. Further, Defendants had actual knowledge of their barrier removal duties under
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the Americans with Disabilities Act and the Civil Code before January 26, 1992. Also, Defendants should have known that individuals with disabilities are not required to give notice to a governmental agency before filing suit alleging Defendants failed to remove architectural barriers.

20. Plaintiff believes and herein alleges Defendants' facilities have access violations not directly experienced by Plaintiff MCCARTHY which would preclude or limit access by MCCARTHY and other persons with disabilities, potentially including but not limited to violations of the ADA, ADA Accessibility Guidelines (Codified in 28 C.F.R. Part 36, App. A) and Title 24 of the California Building Code. Plaintiff alleges Defendants are required to utilize the ADA checklist for Readily Achievable Barrier Removal approved by the United States Department of Justice and created by Adaptive Environments.

21. Based on these facts, Plaintiff alleges he was discriminated against each time he patronized Defendants' facilities. Plaintiff MCCARTHY was extremely upset due to Defendants' conduct.

NOTICE

22. Plaintiff is not required to provide notice to the defendants prior to filing a complaint. *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir 2000).

WHAT CLAIMS PLAINTIFF IS ALLEGING AGAINST EACH NAMED DEFENDANT

23. RAPS HOSPITALITY GROUP d.b.a. HOLIDAY INN EXPRESS HOTEL & SUITES; RAPS NEWARK, INC.; RAPS NEWARK, LLC; INTERCONTINENTAL HOTELS GROUP; and Does 1 through 10 will be referred to collectively hereinafter as "Defendants."

24. Plaintiff aver that the Defendants are liable for the following claims as alleged below:

DISCRIMINATORY PRACTICES IN PUBLIC ACCOMMODATIONS

FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS- **Claims Under The Americans**

With Disabilities Act Of 1990

CLAIM I AGAINST ALL DEFENDANTS: **Denial Of Full And Equal Access**

25. Based on the facts plead at ¶¶ 9 - 21 above and elsewhere in this complaint, Plaintiff MCCARTHY was denied full and equal access to Defendants' goods, services, facilities, privileges.

1 advantages, or accommodations. Plaintiff alleges Defendants are a public accommodation owned,
 2 leased and/or operated by Defendants. Defendants' existing facilities and/or services failed to
 3 provide full and equal access to Defendants' facility as required by 42 U.S.C. § 12182(a). Thus,
 4 Plaintiff MCCARTHY was subjected to discrimination in violation of 42 United States Code
 5 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff MCCARTHY was denied equal access
 6 to Defendants' existing facilities.

7 26. Plaintiff ROBERT MCCARTHY has physical impairments as alleged in ¶ 9 above because
 8 his conditions affect one or more of the following body systems: neurological, musculoskeletal,
 9 special sense organs, and/or cardiovascular. Further, Plaintiff MCCARTHY said physical
 10 impairments substantially limits one or more of the following major life activities: walking. In
 11 addition, Plaintiff MCCARTHY cannot perform one or more of the said major life activities in the
 12 manner, speed, and duration when compared to the average person. Moreover, Plaintiff
 13 MCCARTHY has a history of or has been classified as having a physical impairment as required by
 14 42 U.S.C. § 12102(2)(A).

15
 16 CLAIM II AGAINST ALL DEFENDANTS: **Failure To Make Alterations In Such A Manner**
 17 **That The Altered Portions Of The Facility Are Readily Accessible And Usable By Individuals**
 18 **With Disabilities**

19 27. Based on the facts plead at ¶¶ 9 - 21 above and elsewhere in this complaint, Plaintiff
 20 ROBERT MCCARTHY was denied full and equal access to Defendants' goods, services, facilities,
 21 privileges, advantages, or accommodations within a public accommodation owned, leased, and/or
 22 operated by Defendants. Defendants altered their facility in a manner that affects or could affect the
 23 usability of the facility or a part of the facility after January 26, 1992. In performing the alteration,
 24 Defendants failed to make the alteration in such a manner that, to the maximum extent feasible, the
 25 altered portions of the facility are readily accessible to and usable by individuals with disabilities,
 26 including individuals who use wheelchairs, in violation of 42 U.S.C. § 12183(a)(2).

27 28. Additionally, the Defendants undertook an alteration that affects or could affect the usability
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1 of or access to an area of the facility containing a primary function after January 26, 1992.

2 Defendants further failed to make the alterations in such a manner that, to the maximum extent
3 feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains
4 serving the altered area, are readily accessible to and usable by individuals with disabilities in
5 violation 42 U.S.C. §12183(a)(2).

6 29. Pursuant to 42 U.S.C. §12183(a), this failure to make the alterations in a manner that, to the
7 maximum extent feasible, are readily accessible to and usable by individuals with disabilities
8 constitutes discrimination for purposes of 42 U.S.C. §12183(a). Therefore, Defendants
9 discriminated against Plaintiff in violation of 42 U.S.C. § 12182(a).

10 30. Thus, Plaintiff ROBERT McCARTHY was subjected to discrimination in violation of 42
11 U.S.C. § 12183(a), 42 U.S.C. §12182(a) and 42 U.S.C. §12188 because Plaintiff ROBERT
12 McCARTHY was denied equal access to Defendants' existing facilities.

13
14 CLAIM III AGAINST ALL DEFENDANTS: **Failure To Remove Architectural Barriers**

15 31. Based on the facts plead at ¶¶ 9 - 21 above and elsewhere in this complaint, Plaintiff
16 ROBERT McCARTHY was denied full and equal access to Defendants' goods, services, facilities,
17 privileges, advantages, or accommodations within a public accommodation owned, leased, and/or
18 operated by Defendants. Defendants failed to remove barriers as required by 42 U.S.C. § 12182(a).
19 Plaintiff is informed, believes, and thus alleges that architectural barriers which are structural in
20 nature exist within the physical elements of Defendants' facilities in violation of Americans With
21 Disabilities Act Accessibility Guidelines (Codified in 28 C.F.R. Part 36, App. A; hereinafter
22 "ADAAG") and Title 24 of the California Building Code. Title III requires places of public
23 accommodation to remove architectural barriers that are structural in nature to existing facilities.
24 [See, 42 United States Code 12182(b)(2)(A)(iv).] Failure to remove such barriers and disparate
25 treatment against a person who has a known association with a person with a disability are forms of
26 discrimination. [See 42 United States Code 12182(b)(2)(A)(iv).] Thus, Plaintiff ROBERT
27 McCARTHY was subjected to discrimination in violation of 42 United States Code
28

12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because he was denied equal access to Defendants' existing facilities.

CLAIM IV AGAINST ALL DEFENDANTS: **Failure To Modify Practices, Policies And Procedures**

32. Based on the facts plead at ¶¶ 9 - 21 above and elsewhere in this complaint, Defendants failed and refused to provide a reasonable alternative by modifying its practices, policies and procedures in that they failed to have a scheme, plan, or design to assist Plaintiff and/or others similarly situated in entering and utilizing Defendants' services, as required by 42 U.S.C. § 12188(a). Thus, Plaintiff ROBERT McCARTHY was subjected to discrimination in violation of 42 United States Code 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff ROBERT McCARTHY was denied equal access to Defendants' existing facilities.

33. Based on the facts plead at ¶¶ 9 - 21 above, Claims I, II, and III of Plaintiffs' First Cause Of Action above, and the facts elsewhere herein this complaint, Plaintiff will suffer irreparable harm unless Defendants are ordered to remove architectural, non-architectural, and communication barriers at Defendants' public accommodation. Plaintiff alleges that Defendants' discriminatory conduct is capable of repetition, and this discriminatory repetition adversely impacts Plaintiff and a substantial segment of the disability community. Plaintiff alleges there is a national public interest in requiring accessibility in places of public accommodation. Plaintiff has no adequate remedy at law to redress the discriminatory conduct of Defendants. Plaintiff desires to return to Defendants' places of business in the immediate future. Accordingly, the Plaintiff alleges that a structural or mandatory injunction is necessary to enjoin compliance with federal civil rights laws enacted for the benefit of individuals with disabilities.

34. WHEREFORE, Plaintiff prays for judgment and relief as hereinafter set forth.

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SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS - **CLAIMS UNDER**

CALIFORNIA ACCESSIBILITY LAWS

CLAIM I: Denial Of Full And Equal Access

35. Based on the facts plead at ¶¶ 9 - 21 above and elsewhere in this complaint, Plaintiff ROBERT McCARTHY was denied full and equal access to Defendants' goods, services, facilities, privileges, advantages, or accommodations within a public accommodation owned, leased, and/or operated by Defendants as required by Civil Code Sections 54 and 54.1. Defendants' facility violated California's Title 24 Accessible Building Code by failing to provide equal access to Defendants' facilities.

36. These violations denied Plaintiff ROBERT McCARTHY full and equal access to Defendants' facility. Thus, Plaintiff ROBERT McCARTHY was subjected to discrimination pursuant to Civil Code §§ 51, 52, and 54.1 because Plaintiff ROBERT McCARTHY was denied full, equal and safe access to Defendants' facility, causing severe emotional distress.

CLAIM II: Failure To Modify Practices, Policies And Procedures

37. Based on the facts plead at ¶¶ 9 - 21 above and elsewhere herein this complaint, Defendants failed and refused to provide a reasonable alternative by modifying its practices, policies, and procedures in that they failed to have a scheme, plan, or design to assist Plaintiff and/or others similarly situated in entering and utilizing Defendants' services as required by Civil Code § 54.1. Thus, Plaintiff ROBERT McCARTHY was subjected to discrimination in violation of Civil Code § 54.1.

CLAIM III: Violation Of The Unruh Act

38. Based on the facts plead at ¶¶ 9 - 21 above and elsewhere herein this complaint and because Defendants violated the Civil Code § 51 by failing to comply with 42 United States Code § 12182(b)(2)(A)(iv) and 42 U.S.C. § 12183(a)(2), Defendants did and continue to discriminate against Plaintiff and persons similarly situated in violation of Civil Code §§ 51, 52, and 54.1.

39. Based on the facts plead at ¶¶ 9 - 21 above, Claims I, II, and III of Plaintiffs' Second Cause Of Action above, and the facts elsewhere herein this complaint, Plaintiff will suffer irreparable

1 harm unless Defendants are ordered to remove architectural, non-architectural, and communication
 2 barriers at Defendants' public accommodation. Plaintiff alleges that Defendants' discriminatory
 3 conduct is capable of repetition, and this discriminatory repetition adversely impacts Plaintiff and a
 4 substantial segment of the disability community. Plaintiff alleges there is a state and national
 5 public interest in requiring accessibility in places of public accommodation. Plaintiff has no
 6 adequate remedy at law to redress the discriminatory conduct of Defendants. Plaintiff desires to
 7 return to Defendants' places of business in the immediate future. Accordingly, the Plaintiff alleges
 8 that a structural or mandatory injunction is necessary to enjoin compliance with state civil rights
 9 laws enacted for the benefit of individuals with disabilities.

10 40. Wherefore, Plaintiff prays for damages and relief as hereinafter stated.
 11

12 **Treble Damages Pursuant To Claims I, II, III Under The California Accessibility Laws**

13 41. Defendants, each of them respectively, at times prior to and including the date Plaintiff
 14 patronized Defendants facilities and continuing to the present time, knew that persons with physical
 15 disabilities were denied their rights of equal access to all portions of this public facility. Despite
 16 such knowledge, Defendants, and each of them, failed and refused to take steps to comply with the
 17 applicable access statutes; and despite knowledge of the resulting problems and denial of civil
 18 rights thereby suffered by Plaintiff and other similarly situated persons with disabilities.
 19 Defendants, and each of them, have failed and refused to take action to grant full and equal access
 20 to persons with physical disabilities in the respects complained of hereinabove. Defendants, and
 21 each of them, have carried out a course of conduct of refusing to respond to, or correct complaints
 22 about, denial of disabled access and have refused to comply with their legal obligations to make
 23 Defendants' public accommodation facilities accessible pursuant to the Americans With Disability
 24 Act Access Guidelines (ADAAG) and Title 24 of the California Code of Regulations (also known
 25 as the California Building Code). Such actions and continuing course of conduct by Defendants,
 26 and each of them, evidence despicable conduct in conscious disregard of the rights and/or safety of
 27 Plaintiff and of other similarly situated persons, justifying an award of treble damages pursuant to
 28

sections 52(a) and 54.3(a) of the California Civil Code.

42. Defendants, and each of their actions have also been oppressive to persons with physical disabilities and of other members of the public, and have evidenced actual or implied malicious intent toward those members of the public, such as Plaintiff and other persons with physical disabilities who have been denied the proper access to which they are entitled by law. Further, Defendants, and each of their, refusals on a day-to-day basis to correct these problems evidence despicable conduct in conscious disregard for the rights of Plaintiff and other members of the public with physical disabilities.

43. Plaintiff prays for an award of treble damages against Defendants, and each of them, pursuant to California Civil Code sections 52(a) and 54.3(a), in an amount sufficient to make a more profound example of Defendants and encourage owners, lessors/lessees, and operators of other public facilities from willful disregard of the rights of persons with disabilities. Plaintiff does not know the financial worth of Defendants, or the amount of damages sufficient to accomplish the public purposes of section 52(a) of the California Civil Code and section 54.3 of the California Civil Code.

44. Wherefore, Plaintiff prays for damages and relief as hereinafter stated.

DEMAND FOR JUDGMENT FOR RELIEF:

- A. For general damages pursuant to Cal. Civil Code §§ 52 or 54.3;
- B. For \$4,000 in damages pursuant to Cal. Civil Code § 52 for each and every offense of Civil Code § 51, Title 24 of the California Building Code, ADA, and ADA Accessibility Guidelines (Codified in 28 C.F.R. Part 36, App. A);
- C. In the alternative to the damages pursuant to Cal. Civil Code § 52 in Paragraph B above, for \$1,000 in damages pursuant to Cal. Civil Code § 54.3 for each and every offense of Civil Code § 54.1, Title 24 of the California Building Code, ADA, and ADA Accessibility Guidelines;
- D. For injunctive relief pursuant to 42 U.S.C. § 12188(a). Plaintiff requests this Court enjoin Defendants to remove all architectural and communication barriers in, at, or on their facilities

1 including without limitation violations of the ADA, ADA Accessibility Guidelines and Title 24 of
2 the California Building Code

3 E. For attorneys' fees pursuant to 42 U.S.C. § 1988, 42 U.S.C. § 12205, Cal. Code of Civil
4 Procedure §§ 1032 and 1033.5, and Cal. Civil Code § 52;

5 F. For treble damages pursuant to Cal. Civil Code §§ 52(a) or 54.3(a);

6 G. A Jury Trial and;

7 H. For such other further relief as the court deems proper.
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9 Respectfully submitted:

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11 Dated: June 29, 2007
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PINNOCK & WAKEFIELD, A.P.C.

By: 

DAVID C. WAKEFIELD, ESQ.

Attorneys for Plaintiff
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